

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**RUSSELL REID WASTE HAULING &
DISPOSAL SERVICE COMPANY, INC.¹**

Employer

and

CASE NO. 22-RC-261504

**INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 825**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

On June 11, 2020, International Union of Operating Engineers, Local 825 (the Petitioner), filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act (the Act), seeking to represent certain employees of Russell Reid Waste Hauling & Disposal Service Company, Inc. (the Employer), at its facility located at 200 Smith Street, Keasbey, New Jersey, and at its satellite facility located at 635 Delancey Street, Newark, New Jersey. A hearing was held before a hearing officer of the National Labor Relations Board (the Board) via teleconference on July 1, 2020. Post-hearing briefs timely submitted by both parties have been carefully considered.

The sole issue in this matter is whether to conduct a manual or mail-ballot election given the constraints of the COVID-19 pandemic. At hearing, the hearing officer permitted the parties to give their positions on the election method. The Employer asserts that, with certain precautions in place, a manual election is the most appropriate method. Conversely, the Petitioner contends that a mail-ballot election is necessary in light of the pandemic. As further discussed below, I have determined that the Board will conduct this election by mail ballot.

To provide context for my discussion of this matter, I begin with my findings. I then explain the relevant Board law concerning the mechanics of elections. Next, I summarize the parties' positions. Finally, I conclude by applying Board law to the facts of this case.

¹ The parties' full and correct names appear as amended.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find as follows:

1. The hearing officer's rulings made at hearing are free from prejudicial error and are hereby affirmed.²
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.³
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
6. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.
7. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

² At hearing, the Employer objected to the hearing officer's admission of the portions of Board Exh. 3 that contain select executive orders of the Governor of New Jersey. In support of its objection, the Employer (1) argued that the hearing officer excluded other executive orders relevant to this proceeding, and (2) speculated that to exclude other relevant executive orders from the record would waive the Employer's right to rely on them in any appellate review. However, in its brief, the Employer pointed to additional executive orders. These executive orders are public record, and I hereby take administrative notice of them in this decision. Consequently, I find it unnecessary to pass on the Employer's objection.

The Employer also objected to the hearing officer's admission of Board Exhs. 4 and 5 into the record, arguing that the exhibits were not authenticated in accordance with the Federal Rules of Evidence. In deciding this matter, I have not relied on Board Exhs. 4 and 5. Consequently, I again find it unnecessary to pass on the Employer's objection.

³ In stipulating that the Employer is engaged in commerce, the parties stipulated that "Russell Reid Waste Hauling and Disposal Service Co., Inc, is a New Jersey corporation engaged in the non-hazardous waste management services business at its 200 Smith Street, Keasbey, New Jersey facility, the only facility involved herein. During the preceding twelve months, the Employer, in the course and conduct of its business operations described above, purchased and received at its Keasbey, New Jersey facility goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey." Although the stipulation states that the facility at 200 Smith Street is "the only facility involved herein," the parties also stipulated, and reaffirmed at hearing, that the appropriate bargaining-unit includes the petitioned-for employees at both the 200 Smith Street and the 635 Delancey Street facilities. Neither party has argued, either at hearing or on brief, that the Employer's facility at 635 Delancey Street is not involved in this matter. Accordingly, I find that the both facilities are involved in this matter.

All full-time and regular part-time Bulk Technicians, Grease Technicians, Jet Rod Technicians, Master Service Technicians, Roll-Off Technicians, Septic Technicians, Equipment Specialists, Equipment Specialist Leads, Mechanics, and Mechanic Leads employed by the Employer at its facility located at 200 Smith Street, Keasbey, New Jersey, and at a satellite facility located at 635 Delancey Street, Newark, New Jersey, but excluding all office clerical employees, managerial employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

II. BOARD LAW

It is well settled that the Board leaves to the discretion of its Regional Directors decisions on the mechanics of an election, including the method. *Ceva Logistics U.S., Inc.*, 367 NLRB 628, 628 and cited cases (2011). In *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998), the Board articulated certain guidelines for its Regional Directors to take into account when deciding whether to conduct a mail-ballot election. In addition to those guidelines, the Board recognized that its Regional Directors may consider “other relevant factors” and that “extraordinary circumstances” may permit a mail-ballot election for reasons other than those the Board explained in its guidelines.

III. POSITIONS OF THE PARTIES

A. The Employer’s Position

The Employer asserts that, with the appropriate precautions, a manual election is the most appropriate method for conducting the election. At hearing and on brief, the Employer detailed the steps it would take to ensure the safety of all participants in the election process. These proposed steps fully conform with the procedures laid out in General Counsel Memorandum GC 20-10 (issued July 6, 2020). The Employer argues that these safety precautions create a safer environment than the “general societal environment (e.g., shopping for groceries or clothing, visiting a museum, getting a haircut, etc.).”

The Employer has proposed an open office area of approximately 1,800 square feet for the polling location in a manual election. Responding to the Petitioner’s contention at hearing that this location has surveillance cameras and is near a manager’s office, the Employer notes on brief that the cameras may be covered and that the manager in question will work offsite or in another area of the facility on the day of the election.

At hearing, the Employer proposed a seven-hour voting window for a manual election, beginning at 11:00 a.m. and ending at 6:00 p.m. Alternatively, the Employer is amenable to a shorter voting period or multiple shorter voting periods. The Employer noted at several times during the hearing and on brief that the employees have different starting and ending times for their shifts.

Citing to a number of the Governor of New Jersey's executive orders, the Employer also argues that New Jersey's significant reopening since the inception of the pandemic weighs in favor of a manual-ballot election.

B. The Petitioner's Position

The Petitioner contends that a mail-ballot election is the only provably safe method for conducting this election. The Petitioner argues that the precautions and procedures outlined in GC 20-10 are untested, non-exhaustive, and fail to address how the parties and the Board will handle confirmations that an individual involved in the election has contracted or possibly been exposed to the coronavirus.

IV. DISCUSSION

The Board's longstanding policy is that elections should generally be conducted manually. NLRB Casehandling Manual Part Two Representation Proceedings, Sec. 11301.2. However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. *Id.* This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other extraordinary circumstances. *San Diego Gas*, supra at 1145.

While the Board has expressed a general preference for manual balloting, it has never hesitated to ballot by mail when the circumstances warrant it. Indeed, the Board's preference for manual elections is not to be interpreted as a suggestion that mail balloting is somehow inferior or a less reliable or effective means of determining employees' representational desires. As the Board noted in *London's Farm Dairy, Inc.*, 323 NLRB 1057, 1058 (1997):

[W]hile we agree with our dissenting colleague that the Agency has a proud long tradition of conducting elections by manual balloting and that most elections have been and are conducted manually, it has an equally long history of conducting elections by mail. From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail. See, for example, *Lykes Bros. S.S. Co.*, 2 NLRB 102, 108, 111 (1936); *United Press Assns.*, 3 NLRB 344, 352 (1937); *Pacific Greyhound Lines*, 4 NLRB 520, 539 (1937); *Pacific Lumber Inspection Bureau*, 7 NLRB 529, 534 (1938); *Salt River Valley Water Users Assn.*, 32 NLRB 460, 472 (1941); *Continental Bus Systems*, 104 NLRB 599, 601(1953); and *National Van Lines*, 120 NLRB 1343 (1958).

On May 8, 2020, in *Atlas Pacific Engineering Company*, 27-RC-258742 (May 8, 2020), the Board, in denying the employer's request for review, stated that the COVID-19 pandemic constitutes extraordinary circumstances warranting a mail ballot where federal, state, and local government directives have limited nonessential travel, required the closure of nonessential businesses, and resulted in a determination that the regional office charged with conducting the election should remain on mandatory telework.

At the heart of this issue is whether the public health concerns presented by the COVID-19 pandemic constitute such extraordinary circumstances to warrant a mail-ballot election. While the Employer has offered certain measures to ameliorate these public health concerns, and although these measures coincide with the General Counsel's recent memorandum on suggested manual election protocols, I find that a mail-ballot election is the only appropriate method for this case.

The Employer's proposed location for a manual election at its facility in Keasbey, New Jersey, is only a five-mile drive to Staten Island, New York City.⁴ New York City has been one of the epicenters of the pandemic: on its own, and without including the rest of the State of New York, New York City has the fourth largest amount of COVID-19 cases of the United States' states and territories.⁵ Although New York City has made strides in combatting the pandemic, New York's governor noted on July 18, 2020, that the state is "alarmed by spikes in much of the country and the risk of a lack of compliance at home as the state pursues a phased, data-driven reopening."⁶

More important than the current situation in nearby New York City is that the county in which the Employer's proposed election site is located, Middlesex County of New Jersey, continues to see new cases of COVID-19. As of July 20, 2020, Middlesex accounted for 17,168 of the confirmed 176,963 cases of COVID-19 in New Jersey, which is approximately 9.7 percent of the state's confirmed cases.⁷ While the number of new cases appears to be slowing, the New Jersey Department of Health notes on its summary findings that new illnesses occurring since about the beginning of July may not yet be reported.⁸

Although the sources I have cited above concerning the pandemic show a slowing of COVID-19's spread, the polling times that a manual election would require do not favor that method. Here, of the 35 employees on the employee list attached to the Employer's position statement, the record shows the Employer has 19 different approximate start times or ranges of

⁴ I have taken administrative notice of the approximate distance between the Employer's facility at 600 Smith Street to New York's side of the Outerbridge Crossing on Staten Island using Google Maps (<https://www.google.com/maps>). See *Bud Antle, Inc.*, 361 NLRB 873 (2014), incorporating by reference *Bud Antle, Inc.*, 359 NLRB 1257 (2013), and specifically footnote 3 of 359 NLRB at 1257, where the Board takes administrative notice of approximate distances based on Google Maps.

⁵ See <https://www.cdc.gov/covid-data-tracker/#cases> (last visited 7/20/2020). I also note that New Jersey's total amount of COVID-19 cases is the sixth highest amongst the states and territories.

⁶ See <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-12> (last visited 7/20/2020).

⁷ See <https://covid19.nj.gov> (last visited 7/20/2020).

⁸ See https://www.state.nj.us/health/cd/documents/topics/NCOV/COVID_Confirmed_Case_Summary.pdf (last visited 7/20/2020).

start times for these employees. Some of the ranges of start times were as short as one hour, such as 5:00 a.m. to 6:00 a.m., and some were as long as two and a half hours, such as 3:30 a.m. to 6:00 a.m. The earliest approximate start time was the range of 2:30 a.m. to 4:00 a.m., which was applicable to four employees. The latest start time was 7:00 p.m., which was applicable to one employee.

Given the large variance in the employees' approximate starting times, any manual election in this case would require, under the best of circumstances, lengthy hours of polling. Under non-pandemic circumstances, I would undoubtedly direct such a manual election. However, and notwithstanding New Jersey's emerging reopening, because prolonged polling hours increase the chances for contact amongst voters, observers, the parties' representatives and Board agents, I find that the Employer's proposed safety precautions would not sufficiently ameliorate the potential health risks of a manual election. Although the Employer argues that its proposed safety precautions for a manual election make for a safer environment than the general societal environment when, for example, shopping for groceries, a mail-ballot election obviates the possibility of any person-to-person contact. Consequently, a mail-ballot election is only election method that minimizes risk and maximizes safety for all involved parties.

Based on the above and the record as a whole, I find that the ongoing COVID-19 pandemic presents extraordinary circumstances that make a mail-ballot election the only appropriate election method in this case.

V. **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 825.

A. Election Details

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. On **Wednesday, August 5, 2020**, ballots will be mailed to voters by National Labor Relations Board, Region 22. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 22 office by close of business on **Wednesday, August 26, 2020**.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **August 12, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 22 Office at (862) 229-7065, or our national toll-free line at 1-844- 762-NLRB (1-844-762-6572).

Due to the extraordinary circumstances of COVID-19 and the directions of state or local authorities including but not limited to Shelter-in-Place orders, travel restrictions, social distancing

and limits on the size of gatherings of individuals, I further direct that the ballot count will take place virtually on a date to be determined by the undersigned Regional Director, during the period from **Wednesday, September 9, 2020, through Wednesday, September 16, 2020**, inclusive. The Region will provide notice to the parties of the scheduled date for the count at least 24 hours prior to the count. For the same reasons, the count will take place virtually on a platform (such as Skype, Zoom, WebEx, etc.) to be determined by the Regional Director. Each party will be allowed to have one observer attend the virtual ballot count.

If the dates the ballots are due to be deposited by Region in the mail, or the date set for their return, or the date, time, and place of the count for the mail ballot election are postponed or canceled, the Regional Director, in his or her discretion, may reschedule such dates, times, and places for the mail ballot election.

B. Voting Eligibility

Eligible to vote are those unit employees who were employed by the Employer during the payroll period ending **Saturday, July 18, 2020**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, employees engaged in an economic strike that commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military service of the United States may vote by mail in the same manner and pursuant to the same voting schedule as established herein for all other Unit employee voting.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period for eligibility; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be received by the Regional director and the parties by **JULY 24, 2020**. The list must be accompanied by a certificate of service showing service on all parties. The Region will no longer serve the voter list.

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other party(ies) named in this decision (at arestrepo@local68.org and at lbonaguro@decotiislaw.com). The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Section 102.67(k) of the Board's Rules and Regulations requires the Employer to timely post copies of the Board's official Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted. You must also distribute the Notice of Election electronically to any employees in the unit with whom you customarily communicate electronically. In this case, the notices must be posted and distributed **before 12:01 a.m. on July 31, 2020**. If the Employer does not receive copies of the notice by **July 29, 2020**, it should notify the Regional Office immediately. Pursuant to Section 102.67(k), a failure to post or distribute the notice precludes an employer from filing objections based on non-posting of the election notice.

To make it administratively possible to have election notices and ballots in a language other than English and Spanish, please notify the Board Agent immediately if that is necessary for this election. If special accommodations are required for any voters, potential voters, or election participants to vote or reach the voting area, please tell the Board Agent as soon as possible.

RIGHT TO REQUEST REVIEW


Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file

a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: July 22, 2020



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